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The Ordinance Power of the President

THE ORDINANCE POWER OF THE PRESIDENT

BY

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Chapter I

THE ORDINANCE POWER

In these days of many legislatures it is easy to forget that, before the development of representative government, the king was not only the executor of the laws, but their originator also, and it is well to remember that Parliamentary Government has preserved this union of powers. In the transitions from absolute to representative government the King retained the right to make some laws, and he still issues regulations or ordinances, which are usually purely administrative, but often attain to something near the dignity of legislation. True it is only a remnant of legislative power that remains to him, just as only a fragment of his executive power is left; both powers have been relinquished to the same body--his ministers. They make the law and execute it.

In the United States, our policy of the separation of powers has intended to separate entirely the execution and the making of laws, leaving to the executive the power to recommend some laws and kill others, but to issue nothing that might be called a law. The President merely executes the laws. However, even the most painstakingly framed laws sometimes leave questions as to their exact meaning, and the executive officers who actually execute them must have instructions from above, the President eventually. And even when there is no question of interpretation, the manner of administering the law may necessitate instructions. Again, a case requiring governmental motion may arise about which the legislature has said nothing - nor ever thought of saying anything. The

executive must order some action, and very often the legislature may wish to secure a certain result, say no in a few words, and leave the executive to devise all the methods and means for securing the end sought; or it may order the executive to do specific things.

These various contingencies call forth from the executive a considerable volume of rules, regulations and instructions, which may be spoken of collectively as ordinances. It is the purpose of this investigation to study the mass of orders which issue from the President in an effort to describe the degree of quasi-legislative power thus exercised, and to find out how much of the power is exercised by the President independently.

Before beginning the examination, however, a wider idea of what the Ordinance Power is, may be gained from the customary view of foreign fields.

The early constitutions of France gave the king a wide ordinance power, and the Constitutional law of 1875 sanctioned its exercise by the president. He shall "watch over and ensure" the execution of the laws, or, in another translation, "look after and secure".[1] In the performance of this duty a very large part of French legislation comes out in the form of Presidential decrees. He is, further, given wide powers of substantive legislations with regard to the colonies.[2]

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1. Modern Constitutions, I 286.
2. Goodnow, Principles of Constitutional Government, 101.

The Belgian constitution, copying from the French constitutions of 1830, provides that the king shall "issue all regulations and decrees necessary for the execution of the laws, without power to suspend the laws themselves, or dispense with their execution." (3).

The constitution of the Netherlands lays down a more specific curb on the issue of ordinances by the king. It provides that "General administrative regulations shall be issued by the King" but that "provisions to be enforced by penalties shall not be included among such regulations except by virtue of law. The penalties to be imposed shall be regulated by law." (4)

An attempt is made by the constitution~~s~~ of Norway both to curtail the scope of the king's orders and to limit their application. "The King may issue and repeal regulations concerning commerce, customs, industrial pursuits and public order; however, they shall not be in conflict with the constitution, or with the laws passed by the Storthing - - - . Such regulations shall be in force provisionally until the next Storthing." (5)

The position of the former Emperor of Austria-Hungary was peculiar in that in Austria the executive authorities were "empowered, within the sphere of their respective duties, to issue decrees and orders in execution of the laws, and to enforce the observance of such regulations and of the laws", (6) a comprehensive

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3. Dodd, Modern Constitutions, II 176.
4. Ibid, II 90.
5. 125.
6. Ibid, I 88

power, whereas in Hungary, its exercise by the Emperor was strictly limited by the fundamental law declaration, "His majesty shall exercise the executive power in conformity with law, through the independent Hungarian ministry, and no ordinance, order, decision, or appointment shall have force unless countersigned by one of the ministers residing at Budapest."(7)

All these provisions show that the constitutional law makers on the continent realized the necessity of ordinances from the executive, even as early as 1814 (the Norway constitution). The same recognition appears in the South American constitutions. In that of Uruguay we merely find it stated that the President in exercising the laws shall use the necessary rules and regulations. (8).

The influence of the European efforts to confine executive ordinances to strictly administrative affairs is evident in the Argentina Constitution of 1860. The President "may issue the instructions and regulations necessary for the executions of the laws of the nation, taking care that the spirit of such laws be not changed by exceptions introduced through the said regulations." (9) They foresaw a very subtle form of influence by the President.

The Brazilians, in 1891, did not anticipate such an influence. "To the President of the Republic shall belong the exclusive right: (1) To approve, promulgate and make public the laws and resolutions of the congress; to issue decrees, instructions and regulations for their exact constructions".(10) The presence of this provision is

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7. 99
8. Rodriguez, American constitutions, II 176
9. Dodd, I 23.
10. Ibid. 163.

worthy of notice because their constitution was avowedly modeled after ours.

Chile, in 1833, was willing to hitch the President up even more closely with legislation. "The special powers of the President shall be: (1) To take part in the enactment of laws in conformity with the provisions of the constitution; and to approve and promulgate them. (2) To issue such decrees, regulations, and instructions as he may think proper for the execution of the laws". (11). The President could hardly ask for a wider descretion.

It is in Japan, however, that we find the most explicit and probably the greatest reservation of ordinance power to the executive independent of the legislature. To begin with, the entire constitution (1889) was promulgated by the Mikado, having been written by one of his nobles and not by popular representatives. (12). Its imperial origin is displayed in the title to one of its basic parts, "An Imperial Ordinance concerning the House of Peers"; (13) and the article on legislative powers specifies that "The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, imperial ordinances in the place of laws" - and evidently of equal force and authority. "Such imperial ordinances are to be laid before the Imperial Diet at its next session, and when the diet does not approve the said ordinances, the government shall declare them to be invalid for the future". This for periods of emergency. But for usual times, "the Emperor issues, or causes to be issued, the ordinances necessary for the carrying out of the

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11. 245.
12. Murray, Japan, 394.
13. Dodd, II, 33.

laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no ordinance shall in any way alter any of the existing laws".[14] The supremacy of law over ordinance is, indeed, affirmed in both clauses, but it will be noted that the burden of proof rests on the Diet, in addition to the usual weight of legislative inertia, a condition which is not favorable to a decrease of the ordinance power.

The general nature of this power may, finally, be made quite clear by Mr. Lowell's discussion of the legislative power of the English crown. His description bears a close resemblance, also, to our own conception of the ordinance power. He says,

> "it is important to note that by itself, and apart from Parliament, the Crown has to-day, within the United Kingdom, no inherent legislative power whatever. This has not always been true, for legislation has at times been enacted by the Crown alone in the form of ordinances or proclamations; but the practice may be said to have received its death blow from the famous opinion of Lord Coke, that the King cannot by his proclamations create any offense which was not an offense before, for then he may alter the law of the land. The English Crown has, therefore, no inherent power to make ordinances for completing the laws, such as is possessed by the chief magistrate in France and other continental states. This does not mean that it cannot make regulations for the conduct of affairs by its own servants, by Orders in Council, for example, establishing regulations for the management of the Army, or prescribing examinations for entrance to the civil service. These are merely rules such as any private employer might make in his own business and differ entirely in their nature from ordinances which have the force of laws, and are binding quite apart from any contract of employment.
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> "Power to make ordinances which have the force of law and are binding on the whole community is, however, frequently given to the Crown

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14. Murray, 394.

by statute, notably in matters affecting public health, education, etc., and the practice is becoming constantly more and more extensive, until at present the rules made in pursuance of such powers - known as "statutory orders" are published every year in a volume similar in form to that containing the Statutes. Some of these orders must be submitted to Parliament, but go into effect unless within a certain time an address to the contrary is passed by one of the Houses, while others take effect at once, or often a fixed period, and are laid upon the tables of the Houses in order to give formal notice of their adoption.-----In making such orders the Crown acts by virtue of a purely delegated authority, and stands in the same position as a town council. The orders are a species of subordinate legislation, and can be enacted only in strict conformity with the statutes by which the power is granted. (15).

15. Lowell, Government of England, 19.

Chapter II

THE ORDINANCE POWER OF THE PRESIDENT

There are several reasons why the ordinance power of the President of the United States is not so great as in foreign countries. In most part this power exists abroad as a remnant of the old royal prerogative. That basis for it did not exist here when our government was formed. The particular royal prerogative which the colonials had had experience with had not inclined them to set up anything that might resemble it, so we find no provision in the constitution for any such power in the President. Furthermore, as has been mentioned, the fathers moved directly to place all legislative, or near-legislative, powers in the hands of congress alone by adopting the doctrine of the separation of powers as the basis of their organization. The President was to be the executor of the laws and never in the least instance the source of law. President Benjamin Harrison, expressed very clearly, as his own belief, this conception of the President's power. (1908).

> "'He shall take care that the laws be faithfully executed". This is the central idea of the office. An executive is one who executes or carries into effect. And in a Republic - a Government by the people through laws appropriately passed - the thing to be executed is the law, not the will of the ruler as in Despotic Governments. The President cannot go beyond the law and he cannot stop short of it. His duty and his oath of office take it all in, and leave him no discretion.[1]

This idea of the function of the President automatically made the laws of congress detailed and definite to a degree unheard of

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(1) This country of ours, 97.

in Europe, where the custom was, and is, to state the principles to be applied, make a few general provisions and leave much to be specified by the executive.

It was inevitable, however, as has been stated, that in the mere execution of the laws, and in the exercise of his other duties, the President should issue orders and make decisions. That the makers of the constitution foresaw the necessity of leaving him freedom of action is evidenced by the simplicity and generality of the clause "He shall take care that the laws be faithfully executed". They left him, too, the inclusive and elastic powers of the commander in chief of the Army and Navy. It was quite inevitable, also that congress should at times, intentionally or inadvertently leave some things to the discretion of the Executive.

The performance of these acts by the President caused no great difficulty while the business of government was comparatively simple. The question of the ability of congress to delegate power did arise in the case of Wayman v. Southard, in 1825. The case involved the ability of the courts to make rules for their own government. In the course of the opinion, Chief Justice Marshall observed that "the line has not been exactly drawn which separates these important subjects which must be entirely regulated by the legislature itself, from those of less interest in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details".(2) The Court simply held that "it will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and

(2) 10 Wheaton 142.

exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself."[3]

Matters rested here until the increasing volume and complexity of legislation began to cause congress to enact laws like the Tariff Act of October 1, 1890, leaving to the executive a part of the burden. This law gave the President the power to suspend the free importation of sugar (and five other commodities) from any country assessing duties against us which "he may deem to be reciprocally unequal and unreasonable" and to impose a schedule of duties (prescribed in another section) "for such time as he shall deem just".[4]

Action of the President in accordance with the law soon stepped upon the commercial toes of Marshall Field & Co. and others, and the law was taken to the Supreme court in the case of Field v. Clark. The majority of the court held that the President had not been delegated legislative power. "As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining the fact and in issuing his proclamation, in obedience to the legislative will, be exercised the function of making laws. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect".[5] This opinion was supported by several pages of previous instances in which the President had determined a fact under the order of congress. The judges pointed out that "'the true distinction' as Judge Ramsey speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves

(3) Ibid
(4) 26 Stat. 612
(5) 143 U.S. 693

a discretion as to what it shall be, and conferring authority or discretion as to its execution under and in pursuance of the law. The first cannot be done; to the latter no valid objections can be made,'" (6) and it was reasonably added, that "half the statutes on our books are in the alternative (form) depending upon the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them."

In spite of the cogency of this general reasoning, Chief Justice Fuller and Justice Lamar felt compelled to dissent strongly on the constitutionality of the clause. They contended that the cases cited had not been analagous, nor sufficient to establish the practice of the government, and that even if they had been both, they could not hide the unconstitutionality of this act, for it enabled the President to determine our commercial policy with certain countries, and to impose and lift duties on their products at will for reasons of his own - plain legislative actions.

To the reader of the case there seems much force in the contentions of both sections of the court. The truth seems to be that it is unpractical, if not impossible, for congress to complete and give full force to many modern laws. The executive must be intrusted with wide discretion in giving effect to the intent of the law. This seems to have been the idea of the court, and since, as the dissenters pointed out only too forcibly, the constitution provides that "<u>all</u> legislative powers herein granted shall be vested in a congress --- " (Art. I, sec. 1) it was necessary to call these delegated powers by some name other than legislative.

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(6) Ibid.

The practical limitations of legislative action in the increasingly numerous and complicated subjects coming before Congress, led the court to develop in a series of cases[7] this ability of the executive to perform discretionary acts in applying the statutes. The tea case is typical of the others. An act of March 2, 1897 had given the Secretary of the Treasury authority to create and maintain a board of experts on tea, and upon their recommendation to fix uniform standards of purity, quality, and fitness for consumption, for all kinds of teas imported into the United States. It was not long, of course, after the standards had been fixed before the rejection of some cargoes of inferior teas brought the matter before the Court. It held, in the case of Buttfield v. Stranahan, Feb. 23, 1904, that the law did not "in any real sense, invest administration officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."[8]

These recognitions of a field of executive effort in giving full effect to acts of congress, soon compelled the court to give some kind of legal status to it. This it did the next year in the case of U.S. v. Eaton, Mr. Justice Blatchford speaking.

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(7) U.S. v. Bailey, 9 Peters 238; Cosmos Co. v. Gray Eagle Co. 191 U.S. 309; Roughton v. Knight, 219 U.S. 537; Smith v. Whitney 116 U.S. 167: U.S. v. Heiszen, 206 U.S. 370; St. Louis I.M. & S. Ry. Co. v. Taylor, 210 U.S. 281; Monongahela Bridge Co. v. U.S., 216 U.S. 177.

(8) 192 U.S. 470.

"Regulations prescribed by the President and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done by them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."(9)

This is, perhaps, the most often quoted interpretation of the status of executive rules, being cited especially to show that they have the force of law. While it undoubtedly does go far in that direction, it will be noted that it contains many cautious qualifications. The regulations must, in the first place, be authorized by congress. Then they "may be" regulations prescribed by law, and "may have" the force of law, but it does not follow that a citizen is guilty of a criminal offense in neglecting to obey them, unless congress has distinctly made it so.

Succeeding decisions were equally cautious, the next generalization attempted being even more reserved. Justice Brewer in the case of Caha v U.S., 1893, ruled that "it may be laid down as a general rule deducible from the cases,(10) that whenever, by the express language of any act of congress, power is intrusted to either of the principle departments of government to prescribe rules and regulations for the transaction of business." these regulations "become a mass of that body of public records of which the courts take judicial notice."(11)

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(9) 144 U.S. 677, 688.
(10) Jones v. U.S., 137 U.S. 220; Knight v. U.S. Land Co. Associates, 142 U.S. 161, 169; Jenkins v. Collard, 145 U.S. 546. Also, (earlier) U.S. v. Teschmaker, 22 Howard 292, 405; Romero v. U.S. 1 Wallace 154; Armstrong v. U.S., 13 Wallace 154.
(11) 152 U.S. 211, 222.

The ruling in U.S. v. Eaton contained the plain implication that, if congress had expressly provided penalties to support authorized executive regulations, the citizen was guilty of a criminal offense in neglecting to obey them. But surely, it was naturally contended, if congress goes this far, the executive regulation must be a part of the law itself, and therefore beyond the power of congress to authorize. The court refused to call such regulations legislative, however, in the opinion of U.S. v. Grimand, delivered in 1910, by Justice Lamar.

> "Congress may delegate power to fill up details where it has indicated its will in the statute, and it may make violations of such regulations punishable by statute; and so held, that regulations made by the Sec. of Agriculture as to grazing sheep on forest reserves have the force of law and that violations thereof are punishable, under act of June 4, 1897.
>
> "Congress acted within its constitutional power in giving the Secretary of Agriculture authority to regulate grazing in the national forests; the power so conferred being administrative and not legislative.
>
> "The authority to make Administrative rules is not a delegation of legislative power, and such rules to not become legislation because violations thereof are punished as, public offenses.(12)

By the same argument, congress did not delegate legislative power to the Inter-State Commerce Commission in giving it the power to fix rates (Intermountain Rate cases U.S. 234; 477) and the wide power over business delegated to the Federal Reserve Board was not legislative (First Nat'l Bank of Bay City, Mich. v. Union Trust Co. U.S. 244; 416).

All these decisions evidence the expansion of the field of executive action, but show continually the influence of the separa-

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(12) 220 U.S. 506.

tion of powers principle, and the custom of legislating in great detail, working against the increase of power in the President that might be called legislative. It will be found that there is a corresponding increase in the number of measures which the President takes, without regard to Congressional authority, under one of his broad constitutional powers, or by virtue of the inherent competency of his office to act. But here also will appear the same lack of a standard in calling a measure of the President an "ordinance". The presumption is that it is simply an executive act, purely administrative, and not at all legislative. In the other hand if congress takes the same action, no matter how trivial and inconsequential the subject, it is indisputably a proper part of the field of legislative endeavor.

Chapter III

DEPARTMENTAL REGULATIONS

The Ordinance Power of the President is exercised most directly in the form of Proclamations and Executive Orders. These are among the most familiar evidences of the President's activity. But before discussing them, it will make the nature and extent of the Ordinance Power more evident to describe, first, the rules, regulations, and instructions coming from the great executive departments. These regulations fall into two classes (1.) those issued by the department heads, (2.) those issued by their subordinates. Of the first class there are three kinds, (a) those issued at the direct order of the President, (b) those issued by virtue of congressional authority or mandate, (c) others given out on their own authority as necessary to the discharge of their functions.

For all these acts the President is responsible. His responsibility for the first group, those ordered by him, would seem clear, and the Court has construed all the other acts of the department heads as his acts. "The Act of an Executive Department is in legal contemplation the act of the President."(1)

This ruling accounts for a great body of regulations. But there are (2), numerous others issued by bureau chiefs and commissioners in the same way, either by order of the head of the department, of congress, or by derived authority. What of these? Shall they, too, be construed as in legal contemplation the acts of the President? The court has never taken this step. Presum-

(1) Wilcox v. Jackson, 13 Peters 513; Hegler & Faulkner, 153 U.S.117.

ably it might, but would more probably hold then the acts of the Department head. In either case, the ultimate responsibility lodges in the President.

The chief of these secondary systems of regulations are those of the Army and the Navy; of the postal service, patent office, pension office, land and Indian offices, civil service, customs, internal revenue and revenue cutter services; and of the Treasury Department, Agriculture Department, and State Department - diplomatic and consular. Some description of their nature and extent will be given under the various departments.

The most conspicuous of the rules of the Department of Agriculture are the grazing regulations for the National forest reserves, issued January 1, 1906, and upheld in the case of U.S. v. Grimand, previously quoted. Soon after, a schedule of fees for grazing was issued, and definitions of grazing trespass, with instructions for its prevention, and the ruling that national forests are not subject to State fence laws (Mch. 20, 1908)[2]

In the Department of Commerce there have been twenty-eight issues of Immigration Laws and Regulations. The War, Navy, and Treasury departments also have codes on the same subject. Pilot rules are very detailed and frequently brought up to date.[3]

The Department of the Interior is the source of several sets of regulations. There are rules for Indian Schools, covering courses of study, texts, etc., and regulations on timber, town sites, trade, tribal funds and other Indian affairs.[4] The Land

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(2) Checklist, U.S. Public Documents, 1789-1909, p.241
(3) Ibid, 335.
(4) Ibid. 502.

Office has Rules for Practice edited first in 1880, and Surveying Instructions dating from 1855.[5] The Patent Office has published yearly or semi-annual Rules of Practice since 1869.[6] Regulations and Laws on Army and Navy pensions have been revised frequently from 1871. An example of their character may be found in the rules governing half pensions to wives or children. A law of March 3, 1899, directed that in case of desertion of family, or residence in a soldier's home, one-half of the pension should be paid to wife or children, if worthy, all questions arising under the act, to be determined by the Commissioner of Pensions. Accordingly, that official drew up a set of twenty-four rules covering every possible case that could arise under the act (and it was found that they were many) and stating in detail the steps necessary to prove the claim in each case. After viewing the rules, it would seem impossible to operate the act without them.[7]

The Attorney General is the source of books of instruction to United States clerks, commissioners, attorneys, marshals, and penitentiaries, with especially elaborate editions for Alaska and Indian territories. Similarly the Post Master General has given out volumes of postal laws and regulations at intervals of two to eight years since 1798.

For the Department of State, the principal set of rules is, naturally, the Instructions to Diplomatic Officers, issued by the President through it. The edition of 1897 is a book of 150 pages, covering both consular and diplomatic services. The practice has

(5) Ibid, 509
(6) Ibid, 532
(7) Edition of 1916.

been to publish the consular rules separately. Beginning with a list of the papers to be furnished the diplomats (Sec.1.), the instructions carry the officer through the mysteries of diplomatic immunities, exhort them to be reticent, warn them that Congress will not want them to wear uniforms, explain how to file their papers, propound the laws of marriage when performed by consuls, prescribe the maximum time limits for all journeys to and from Washington, and instruct him in his obligations generally, including a final one to pay his own funeral expenses unless Congress shall enact otherwise. (Sec. 360).

The Treasury Department, of course, prescribes many kinds of rules. There have been sixty-eight issues of General Regulations; many have dealt with customs, fur-seal fishing, insurrectory states and merchandise, Coast and Geodetic Survey; instructions have often been compiled for supervising architects, custodians, and Superintendents. The Income Tax Regulations are issued by the authority of the Secretary of the Treasury. Those of October 3, 1913, consisted of two hundred articles defining, quoting and construing the law to cover all the cases which might be expected to arise. Hundreds of others have dealt with Internal Revenue, the mints, and Revenue Cutter Service.

The rules for the latter were nearly a thousand in number. Section 701 named the penalties that might be imposed upon commissioned officers and upon enlisted men, by commanders, and provided for the trial of more serious cases.(8) By our court precedents this was surely an exercise of legislative power. They

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(8) Lieber, G.N., Remarks on Army Regulations, 139.

were in force until 1906, however, and seem never to have been challenged. In that year, congress enacted the regulations regarding punishment by commanders almost verbatim, constructed the Secretary of the Treasury's Boards of Investigation into Revenue Cutter Service Courts, and defined their jurisdiction and powers.[9] This is an example, then, of regulations which even exercised the "force of law", and which actually became law.

The body of rules and instructions coming out of the Navy Department is similarly large, though few of them might be called ordinances. There have been 180 regulation circulars since 1865. Before that date there were nine formal "Navy Regulations" beginning in 1775; and nine after it. General Orders number 872 since 1863, Navy Yard Orders 860 since 1893, and Special Orders 320.[10] Regulations governing the Naval Academy come out regularly, and there are rules and instructions on scores of subjects - age of employees, apprentices, efficiency, hours of labor, promotions, punishments.[11]

The War Department issues a corresponding body of regulations, chiefly military and administrative. The Secretary of War, like the Secretary of the Navy, issues these orders as the head of a department, but he gives out the Army Regulations as the agent of the President. "Army Regulations" are, now certainly, the most familiar of all the executive regulations. They may be divided into four classes.[12] (a) The Secretary of War does make some of them by virtue of the Authority conferred by Sec. 161 Revised Statutes on the head of each Department "to prescribe regulations not incon-

(9) West, U.S. Compiled Statutes, 1918. P.1340
(10) All to 1919.
(11) Checklist U.S. Pub. Doc. 771.
(12) Lieber, Remarks on A.R., Chap. 1.

sistent with law, for the government of his department" and, in this connection, a long continued practice has been held equivalent to a specific regulation.[13] (b) Those that are made pursuant to, or in execution of a statute. These, if it be not prohibited by the statute, may be modified by the executive authority. "The power to establish implies, necessarily, the power to modify, or repeal, or create anew"[14] and, "army regulations, made pursuant to the authority conferred by congress have the force of law."[15] (c) Those which have received the sanction of Congress. These cannot be altered, nor can exceptions be made to them by the executive authority, unless the regulations themselves provide for it. By the approval of Congress they are "legislative regulations." (d) "Those emanating from, and depending on, the constitutional authority of the President as commander in chief of the Army and as Executive.--- These constitute the greater part of the Army Regulations. They are not only modified at will by the President, but exemptions from particular regulations are given in exceptional cases; the exercise of this power with reference to their being found necessary. 'The authority which makes them (regulations) can modify or suspend them as to any case or class of cases generally.'[16]"[17]

In general, "the power of the executive to establish rules and regulations for the government of the Army is undoubted."[18]

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(13) U.S. v. Mc Daniel 7 Peters 1; U.S. v. Webster 28 Fed. Cases,515.
(14) U.S. v. Eliason, 16 Peters 302.
(15) Gratiot v. U.S. 4 Howard 80.
(16) Smith v. U.S., 24 ct. cls. 209.
(17) Lieber, 8.
(18) U.S. v. Eliason, 16 Peters 291.

Necessarily, therefore, "the regulations for the administration of law and justice, established by the Secretary of the Navy with the approval of the President have the force of law."[19]

So for all the executive departments, "the regulations of the executive departments have the force of law unless in conflict with acts of Congress. But they may not be in such conflict."[20]

And when once made, a departmental regulation becomes a part of the law to such an extent that the administrative authority making it cannot change it or refuse to enforce it. A firm of importers complied with regulations made by the Secretary of the Treasury entitling them to a rebate of customs duties, which rebate was denied them on the ground that the regulation had been changed. The court held that the importer had a right to his rebate from the law of which the regulations of the Secretary had become a part, and that the Secretary could at no time nullify any part of the law.[21]

(19) Exparte Reed, 100 U.S. 13.
(20) U.S. v. Symonds, 120 U.S. 49.
(21) Campbell v. U.S. 407.

Chapter IV

THE PROCLAMATIONS OF THE PRESIDENTS.

The Presidential Proclamations deal with matters of actual or potential interest to the general public. The great bulk of them are purely administrative in character. It is only here and there that one has the effect of a law sufficient to enable us to call it an ordinance.

Before discussing these, it may be of some informational value to observe the nature of the proclamations as a whole. The following table gives a merely numerical idea of the proclamations. The figures after the names of the Presidents correspond to the number of terms served.

Washington	(2)	12
John Adams	(1)	14
Jefferson	(2)	19
Madison	(2)	16
Monroe	(2)	12
J.J.Adams	(1)	5
Jackson	(2)	10
Van Buren	(1)	5
W.H.Harrison		1
Tyler	(1)	2
Polk	(1)	6
Taylor		3
Fillmore	(1)	7
Pierce	(1)	13
Buchanan	(1)	7
Lincoln	(1)	47
Johnston	(1)	45
Grant	(2)	50
Hayes	(1)	12
Garfield		
Arthur	(1)	16
Cleveland	(2)	71
Benj.Harrison	(1)	66
McKinley	(1)	52
Roosevelt	(2)	403

Taft	(1)	364
Wilson	(1)	110
		1368

These figures are striking only because of the size of the last three, and these do not really represent any unique increase in executive power, because three subjects - national forests, public lands, and reciprocal tariffs - account for all but a few dozens of them. Only a very small inference can be made. It does seem apparent that only the most limited use was made of Proclamations down to 1860. Each presidential term produced about eight of them - 132 in 71 years. The number of proclamations remained fairly constant at this minimum.

From Lincoln on the numbers show a decided increase. But, after noting the allowance for the last figures made above, about all that can be drawn from the tabulation is that the Civil War, and modern needs of government, increased the scope of the proclamations considerably.

The nature of the subjects most often dealt with may be shown by a list of those under which ten or more have been issued.

Calling Congress or the Senate	49
Riots, insurrections, etc.	11
Filibustering	10
Revoking consular exequaturs	10
Conventions and treaties	15
Neutrality	25
Blockade	14
Reciprocity	239
Reconstruction	19
Amnesty	16
Admission of States	13
Expositions	10
Public lands	94

National forests and monuments	603
Days of prayer, thanksgiving, etc.	83

All the Presidents except Taylor and Johnson called either Congress, or the Senate alone, in special session. Eight of them had to warn insurrectory bodies of people to observe the public order, or be proceeded against by the army, while seven of them found it necessary to warn and condemn warlike expeditions being fitted out against Cuba, Mexico or Canada.

Relations with other powers were involved in a large number of others. Five Presidents refused to allow particular consuls of foreign powers longer to perform their functions, President John Adams putting a ban on all the consuls of the French Republic. Lincoln removed the Belgian consul to St. Louis, a United States citizen, in order to draft him,(1) and Johnson ousted the consul for Oldenberg at New York, in order that he might be sued in the courts.(2) He also revoked the exequaturs of about forty consuls representing Hanover, Hesse, Nassau and Frankfort at the request of His Majesty the King of Prussia.(3)

Proclamations of neutrality, or concerning a blockade have been issued intermittently. The Proclamations of neutrality are significant because they made International Law the law of the land. Washington's Proclamation of neutrality April 22, 1793, served as a basis for all later law on neutrality. It stated, directly and simply, that

"Whereas it appears that a state of war exists be-

(1) Richardson, Messages and Papers of the Presidents, VI 219.
(2) Ibid, 512
(3) Ibid, 511

tween Austria, Prussia, Sardinia, Great Britain and the United Netherlands of the one part and France on the other, and the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid toward those powers respectively, and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such disposition.

And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have given instructions to those officers to whom it belongs to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war, or any of them."(4)

Having decided where the "duty and interest" of the country lay, the President proceeded without any hint of a lack of authority, to direct the prosecution by his officers of all persons who "by the modern usage of nations" performed unneutral acts. Furthermore, those who were caught in unneutral acts by the belligerents, were not to receive the protection of the United States.

By the time of the Franco-Prussian War, laws of neutrality had been formed, and penalties duly provided. So, in his proclamation of August 22, 1870, President Grant after reciting four general and sufficient reasons for our neutrality, was able to define eleven

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(4) Ibid, I,156.

classes of prohibited acts. He then published official assurances received from the two warring powers of their intention to abide by certain treaties and stated principles, and enjoined the strictest impartiality in our conduct toward them, under pain of prosecution or abandonment.(5)

The practice of neutrality upon the basis laid down by Washington had by that time been pretty well defined, for, in 1914 President Wilson issued the same proclamation with a few minor additions and a long and definite one stating the provisions of International Law regarding the use of our territorial waters which would be enforced.(6) The prohibited acts referred to above were repeated verbatim, having been included in the Penal Code of March 1909.(7) The proclamation itself was given out seventeen times before the days of our neutrality were ended.

Calling attention to special parts of treaties or to acts of Congress in pursuance of them has been a frequent duty. Occasionally, a President has had to execute independently agreements made in treaties with foreign nations for whose execution Congress made no provision. Such an occasion arose in the administration of John Adams. Article thirty-seven of Jay's treaty with England provided for the mutual extradition of criminals. A British subject committed a murder in a British war vessel on the high seas and afterwards escaped to South Carolina. Congress having passed no law to carry out the agreement, the President, in accord with

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(5) Ibid, VII, 86.
(6) U.S. Stat. at Large 1913-14, Sess 2., Pt. 2, 63-93.
(7) Ibid, vol. 35, pp. 1089-91.

the federal judge before whom the criminal had been brought, turned him over to Great Britain. Edward Livingston, with political ends in view,[8] introduced resolutions in Congress condemning the President, and the resulting excitement was one of the causes of the overthrow of Adams' administration.[9] The President was defended by John Marshall in the House of Representatives. He contended that Congress might unquestionably prescribe the mode of surrender of criminals, but that until it had done so, it was the duty of the Executive Department to execute the contract with Great Britain by any means it possessed,[10] an argument which was later established by the Supreme Court in a judgment of Mr. Justice Gray.[11]

Another case, involving more far reaching action of the Executive under a treaty, occurred during President Roosevelt's administration. The Platt Amendment of the treaty between the United States and Cuba had said that "The government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence and the maintenance of a government adequate for the protection of life, property, and individual liberty". Disorder in Cuba having become serious the President empowered his Secretary of War to use "the Army and Navy in instituting a provisional government", which lasted two years, restored order, provided an impartial election law "conducted a fair election, and then turned the government over to the officers elected under the Constitution of Cuba" - all without any Congressional action. There were, Mr. Taft comments, Senatorial

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(8) Taft, the Presidency, 73
(9) Moore, J.B., Extradition and Interstate Rendition, I, 550.
(10) Ibid, 551
(11) Fong Yue Ting V. U.S., 149 U.S. 698.

mutterings, but Congress passed the necessary appropriations, and "recognized the Government of Cuba in such a way as to make the course taken a real precedent."(12)

A most persistent task of the Presidents, also concerning foreign nations, has been that of securing reciprocal rights for us abroad. Congress has continually passed laws allowing rights or privileges to nationals of other countries on condition that our citizens receive the same rights in those countries. It falls to the President to see that these rights are granted and then continued, the weapon usually given him being the power to suspend or execute acts of Congress. The practice goes back as far as 1799 to the non-intercourse Acts, and has been repeated in many forms. In 1818, Nova Scotia was forced to repeal duties on plaster paris, and Hamburg, Bremen and Lübeck to lift discriminating tonnage dues against our ships, the President in each case lifting corresponding charges levied by Congress.(13)

The custom was established by tariff laws of 1823 and 1828 and was continued until recently. President Taft granted rights of copyright reciprocally to eleven nations, and issued 136 proclamations imposing minimum instead of maximum tariffs. Before him fifteen presidents had taken similar action 93 times. The constitutionality of such acts was upheld in Field v. Clark, quoted ante, on the ground that the President merely determines a fact or condition and does not exert legislative power.

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(12) Taft. 83
(13) Richardson, II 35-7

The process of reducing more isolated cases of friction with other nations has brought out some interesting proclamations. Jefferson, May 3, 1806, advertised for the arrest and trial for murder of Henry Whitby, Captain of the British cruiser Leander, ordering his ships and two other British men-of-war to quit our harbors on pain of being let strictly alone if they did not. And on July 2, because of repeated seizure of our seamen, he forbade the use of our harbors by any English war vessels unless in distress, pursued by an enemy, on government business, or with the mails - exceptions numerous enough it would seem.(14)

But he found it necessary to use even harsher language in condemning those organizing filibustering expeditions against the Spanish dominions, enjoining all officers - State, Federal, and Territorial- to be"vigilant in searching out and condemning to condign punishment" all persons engaged in this business.(15) Van Buren was annoyed by similar manifestants along the Canadian border to order their strict prosecution if on this side of the line and their complete abandonment if caught on the other side.(16) Lincoln evidently thought this a good doctrine for on March 17, 1865, he directed that all persons dwelling in conterminous foreign territory who are caught supplying our warlike Indians with arms and munitions "shall be arrested and tried by Court Martial at the nearest military post, and if convicted shall receive the punishment due to their deserts."(17)

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(14) Ibid, I 402
(15) Ibid, 404
(16) Ibid, III 482 (Jan. 5, 1838)
(17) Ibid VI 279.

In Feb. 10, 1831, we find Jackson evicting a settlement of "persons pretending to act under the authority of the Mexican Government" from three counties in Arkansas.(18) Sept. 10, 1827, saw John Quincy Adams, troubled with violence also, offering a reward of $250.00 for the "apprehension and delivery of Willis Anderson, a murderer, who has absconded and secretes himself so that he cannot be apprehended."(19)

The difficulties of Reconstruction brought out a series of efforts from the Presidents to pacify the south. July 9, 1864, Lincoln was refusing to give assent to the congressional plan of Reconstruction contained in an act of a recent session as the one plan, but calling it "one proper plan" and renewing his pledge of all the executive aid and assistance possible in restoring the states to the Union.(20) In June and July 1865, Johnson was appointing provisional Governors for the seceded states, directing the heads of his executive departments to install the machinery of the federal government in them, and calling constitutional conventions. But it was still all too necessary for Grant to order persons in ten South Carolina counties to deliver up "all arms, ammunition, disguises and uniforms";(21) to command Warren county Mississippi at the request of the Mississippi legislature;(22) and to condemn those "who ride up and down by day and night in arms" at various times.(23)

Later Presidents have had to sign an increasing number of

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(18) Ibid II 543
(19) Ibid 397
(20) Ibid 222
(21) Ibid 139
(22) Ibid 322
(23) Ibid 396

proclamations dealing with the public domain. Under act of March 3, 1891, President Harrison issued 13 proclamations regarding forest reserves, President Cleveland 14, McKinely 16, Roosevelt 307, Taft 176, and Wilson 38. Under a similar act, 39 National monuments of a natural character were also set apart. The proclamations disposing of the public lands are similar in character. Those admitting states were issued on the accomplishment of some revision in the states constitution required by Congress. None of the proclamations of this class are true ordinances on the ground that the President does nothing but ascertain a fact, or carry out the express will of Congress, although they affect the contemporary and future fortunes of many people.

Most of the important proclamations are in fact, directly authorized by act of Congress. Of course, in time of war they have a much wider scope than usual. A short provision in a law of August 10, 1917, gave the President power to license the importation, manufacture and distribution of necessities. Under it ten proclamations were issued from August 14, 1917 to May 14, 1918, and after that surely no person or commodity had escaped the authority or influence of the Food Administration. The importation of hundreds of articles was forbidden, all exports were rigorously supervised when allowed, and the traffic in all essential goods was drastically regulated - that in non-essentials being largely prohibited. The severity of the orders increased in each of the five proclamations issued. The first (July 9, 1917) prohibited the exportation of twenty-five articles to any of fifty-six countries; the second (Aug. 27, 1917) covered, besides seventy-one

classes of articles to enemy countries and those contiguous to them, three hundred thirty enumerated articles to forty other countries; the fifth (Feb. 14, 1918) was a blanket order adding a great variety of articles to the prohibited lists.

Similarly, congress provided in the Espionage Act, June 15, 1917 that "the President in time of war or in course of national emergency may by proclamation designate any place ---- in which anything for the use of the Army and Navy is being prepared, constructed or stored as a prohibited place ----".[24] Whereupon, February 28, 1918, a proclamation stated simply that "for the present, the President designates as a zone of military operations and of military preparations the whole of the United States and its territorial waters and of the Insular possessions and of the Panama Canal Zone".[25]

The same sort of power has been exercised under authority of a Joint Resolution of Congress. Action of a like nature was taken, October 14, 1905, under a Resolution of April 22, 1898, wherein the President was "authorized, in his discretion, and with such limitations and exceptions as shall seem to him expedient, to prohibit the export of coal or other material used in war from any seaport of the United States ---". The Resolution had been made for the purposes of the Spanish War, but President Roosevelt felt that it justified him in prohibiting all exports of munitions of war to the Republic of Santo Domingo from the ports of the United States and of Porto Rico.[26] President Taft felt it necessary to secure a fresh Resolution, March 14, 1912, to empower him to lay

(24) West, Compiled Statutes, 10,212f.
(25) Ibid.
(26) U.S. Stat. at L. 1905-6, Sess. 1, Pt.2, 197.

an embargo on munitions to Mexico. The Proclamation was issued on the same day.[27]

Some proclamations are given out more under a general, implied authority of Congress than by virtue of any specific Act or Resolution. Thus on January 17, 1917, President Wilson took notice of the fact that congress had passed an appropriation for a light house on Navassa Island, in the West Indies, and reserved the island for that purpose. He felt compelled first, however, to prove title to the island. This he did by stating that certain of our citizens had removed the guano deposits from the island, which under act of Congress, August 18, 1856, constituted sufficient ground for its acquisition by him.[28]

In addition to this general authority and to that of his own, the President invoked a third sanction, that of International Law, in taking over the Dutch shipping in our harbors. (March 20, 1918),[29]

In the course of this war, as in former ones, the President issued proclamations which were tatamount to laws purely on his own authority and Congress later gave them statutory form. On the day of our recognition of war with Germany, the President declared and proclaimed, "by virtue of the powers vested in me as such" that the branches of German Insurance companies should continue to do business here, under certain rules and regulations carefully laid down.[30] July 13, 1917, he closed the marine and war

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(27) Ibid, 1911-12. Sess. 2, Pt. 2, 57.
(28) Checklist. U.S. Pub. Doc., Jan. 1917.
(29) Amer. Journ. Int'l Law, April, 1918, 340
(30) U.S. Stat.at Large, 1917, 10.

risks fields of insurance to them.[31] Again, on May 24, 1917, a proclamation in the same terms, authorized the payment of any tax, annuity, or fee which may be required by the laws of the German Empire for the preservation of rights in letters patent.[32] Congress in the Trading with Enemy Act, October 6, 1917, duly recorded and amplified these orders.[33] Whether it would have ever taken the same action originally, amid the popular hatred of things German, is doubtful, since the purpose was to save the financial interests of former Germans from undue loss.

Some acts of the President, performed on his own authority, stood on that ground alone. Thus, in regulating the flying of civilian aircraft, the President "by virtue of the authority vested in (him) by the constitution as commander in chief of the Army and Navy of the United States" prescribed regulations which made it virtually impossible for a civilian to fly anywhere in the United States or its possessions.[34]

Another case of action by the President, unsupported by other authority, appears in the creation of the National War labor Board. The President's proclamation of April 8, 1918,[35] recited that,

> "Whereas, in January, 1918, the Secretary of Labor, upon the nomination of the President of the American Federation of Labor and the President of the National Industrial Conference Board, appointed a War Labor Conference Board, for the purpose------
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> "Whereas, said Board has made a report recommending the creation for the period of the war of a national War Labor Conference Board with the same number of mem-

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(31) Ibid, 40
(32) Ibid, 10
(33) Ibid, 411
(34) Supra. 24
(35) U.S. compiled Stat., 431

"Whereas, the Secretary of Labor has in accordance with the recommendations contained in the report of said War Labor Conference Board dated March 29, 1918 appointed as members of the War Labor Conference Board, Hon. William Howard Taft-------

"Now therefore, I, Woodrow Wilson, President of the United States of America, due hereby appoint and affirm the said appointments and make due proclamation thereof of the following for the information and guidance of all concerned.

"The powers, duties, and functions of the National War Labor Board shall be-------

"The principles to be observed and the methods to be followed by the National Board in exercising such powers and functions and performing such duties shall be those specified in the said report of the War Labor Conference Board dated March 29, 1918, a complete copy of which is hereto appended." (a detailed plan for the settlement of industrial disputes based upon a careful and extended statement of "principles to be observed")

It appears that the whole transaction is extra-"legal". No reference to any of its steps can be found in the statutes. There is no evidence that the members of the Board received any salary; it was appointed by the Secretary of Labor, and its functions planned by an advisory body; yet the President's proclamation certainly gave it an official status and an authority almost as great as - when backed by a war public opinion even greater than — a legislative creation could have given it. Its acts and decisions, too, certainly affected the personal conduct of many people and the progress of the war.

Other proclamations published the laws of treason;[36] licensed the fuel oil industry[37] and the fertilizer industry;[38] declared the export of coin, bullion and currency unlawful;[39] controlled the

(36) April 16, 1917
(37) Jan. 31, 1918
(38) Feb. 25, 1918
(39) Sept. 7, 1917

making of malt liquors, reducing the quantity to be manufactured[40] to 70 per cent, and the alcoholic content to 2.75 per cent; dealt with enemy aliens in a series of twenty intricate rules, vesting great power in the Attorney General to regulate their conduct;[41] fixed guaranteed prices for wheat;[42] and took control of marine cable,[43] telegraph and telephone,[44] express[45] and railway systems.[46]

All of these acts had some kind of statutory basis, though their provisions and extent often doubtless surprised many legislators. That they were war measures appears, for example in the case of the railroads. Their taking over was called forth by a serious congestion of freight, resulting in delays in the movement of war supplies as well as food and fuel. While pointing out the necessity of unified control to meet the existing critical conditions, the President gave full credit to the railroad managers for their loyal efforts to operate the lines efficiently under the stress of war conditions, and at the same time assured the railroad powers that their interests would "be as scrupulously looked after by the government as they could be by the directors of the several railway systems."[47]

In effecting all these large and urgent ends the potency of executive action was evident. In a smaller way, the superiority of the executive, during ordinary times, in framing some kinds of legislation is becoming recognized. In the heart of an appropria-

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(40) Dec. 8, 1917
(41) Nov. 16, 1917
(42) Feb. 21, 1918
(43) Nov. 2, 1918
(44) Effective Aug. 1, 1918
(45) Nov. 16, 1918
(46) Effective Dec. 28, 1917
(47) Pol. Sci. Quart. Sept., 1918. P.25.

tion bill of March 4, 1913, was a provision directing the Department of Agriculture to formulate rules for the protection of migratory game and insectivorous birds, the same to be given out and discussed at public hearings for three months before being submitted to the President. After proclamation by him, violation of these regulations was punishable by fine and imprisonment.(48)

This procedure was followed out as ordered. After formulations, the regulations were published and considered at public hearings until October 1, 1913. As promulgated, it must occur to any reader that Congress could never have made them.. They define and classify dozens of birds, fixing closed seasons for particular ones by states and districts throughout the whole extent of the country; they create breeding and wintering zones, close rivers to hunters, and cover the whole subject in a way that it is difficult to believe a congressional committee could have equaled.(49) There is evidence too that the public took a hand in making the rules, as permitted. The proclamation went farther than the law and provided for hearings at various times after the rules became effective, and the changes found advisable were incorporated in a new draft of the rules proclaimed August 21, 1916.(50)

The same law conferred correspondingly great power on the Department to control the manufacture, sale and use of toxins and serums for animals. All such provisions increase the body of laws which have been actually made by the Executive, but which are in judicial theory all the emanations of Congress. The frequency of their occurrence does seem to be growing.

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(48) U.S. Stat. at large, 1912-13, 847.
(49) Ibid, 1913, Sess. 1, P.20
(50) Ibid, 1915-16, Pt. 2, P.76.

Chapter V.

EXECUTIVE ORDERS

Executive orders are directed to officials of the administration, though they usually affect a part of the public, sometimes all of it. Some of them deal with minor matters of no general interest.

This form of executive action was not used in the first administrations. The editor of the Messages and Papers of the Presidents found executive orders first issued by John Quincy Adams. These were merely of a ceremonial nature - announcing the death of noted men.

Naturally, Jackson found it a handy instrument for uses other than this: a few days after his inauguration he directed that "no pension shall be allowed to any one acting as an officer in the army except in cases which have been heretofore adjudged."(1) Shortly after, he wrote to his department heads, "Sir: You will, after the receipt of this, report to the President for dismissal every clerk in your office who shall avail himself of the benefit of the insolvent debtors act for debts contracted in my administration,"(2) which would lead one to think that the spoils system did not work too well, even at its inception.

The traditional Jackson spirit may have infected his subordinates. At least, in 1836 he had occasion to complain of and over rule the action of Generals Wool and Gaines in calling more troops into the service than had been authorized by Congress. The

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(1) Richardson, Messages and Papers of the Presidents, II 442.
(2) Ibid, 544.

surplus soldiers were to be discharged and later paid when Congress could attend to it. Others besides generals, however, seemed disposed to handle acts of congress vigorously. Congress having abolished the death penalty for desertion in time of peace, the Secretary of War, in order to "give complete effect to the benevolent designs of said act," issued a full and free pardon, specifying that "all who are under arrest for this offense at the different posts and garrisons will be forthwith liberated and returned to their duty. Such as are roaming at large and those under sentence of death are discharged, and are not again to be permitted to enter the army" (3) - a penalty which must have crushed the deserters.

From Jackson to Lincoln, no executive orders of any significance came out, unless we except two incidental to the Mexican War which will be mentioned later.

Lincoln issued many orders which are interesting in themselves, and if no one of them is especially significant, taken together they clearly show the scope and the character of executive action during the Civil War. One of his earliest brings out lucidly the nature of the unparalleled situations the President was obliged to act upon and the spirit in which he handled them.

Washington, April 25,1861

Lieutenant General Scott,

My dear Sir:

The Maryland begislature assembles tomorrow at Annapolis, and not improbably will take action to arm the people of that state against the United States. The

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(3) Ibid, 499.

question has been submitted to and considered by me whether it would not be justifiable, upon the ground of necessary defense, for you, as General in Chief of the United States Army, to arrest or disperse the members of this body. I think it would not be justifiable nor efficient for the desired object.

First. They have a clearly legal right to assemble, and we cannot know in advance that their actions will not be lawful and peaceful, and if we wait until they shall have acted, their arrest or dispersion will not lessen the effect of their action.

Secondly. We cannot permanently prevent their action. If we arrest them, we cannot long hold them as prisoners, and when liberated they will immediately reassemble and take their action; and precisely the same if we simply disperse them - they will immediately reassemble in some other place.

I, therefore, conclude that it is only left to the Commanding General to watch and await their action, which, if it shall be to arm their people against the United States, he is to adopt the most prompt and efficient means to counteract, even, if necessary to the bombardment of their cities and, in the extremest(4) necessity, the suspension of the writ of habeas corpus.

Your obedient servant,
Abraham Lincoln

Sufficiently extreme necessity soon compelled him to suspend the writ of habeas corpus along the Philadelphia-Washington line,(5) then along the line to New York,(6) and eventually "in any place" between Bangor, Maine(7) and the city of Washington. Martial Law was declared in Missouri(8) (1861); most political prisoners held throughout the country were ordered released.(9) In February 1862, a military director of railways was appointed with authority to "take possession of, hold, and use all railroads" and their equipment that might be required for military purposes, by order of the President, Commander in Chief of the Army and Navy of the United States.(10) This step presumably brought action from Congress, for, in May, it

(4) Ibid, VI 17
(5) Ibid, 18
(6) Ibid, 19
(7) Ibid, 39
(8) Ibid, 99
(9) Ibid, 104
(10) Ibid, 101

was

> "Ordered: By virtue of the authority vested by act of Congress, the President takes military possession of all the railroads in the United States from this date until further order, and directs that the respective companies, their officers and servants, shall hold themselves in readiness for the transportation of such troops and munitions of war as may be ordered by the military authorities to the exclusion of all other business".(11)

Like control of the avenues of intelligence was at the same time effected. Feb. 25, 1862, the President by authority of congress took military possession of all the telegraphic lines in the United States, appointed a Controller, and warned the newspapers of printing unauthorized news under penalty of being denied the use of both the wires and the mails.(12) Such warning did not, however, serve to eliminate friction with the press, for, on May 18, 1864, the President issued an order on the subject in language too forcible to be paraphrased. It was addressed to Major General John A. Dix, commanding at New York.

> "Whereas there has been wickedly and traitorously printed and published this morning in the New York World, and New York Journal of Commerce,--- a false and spurious proclamation, purporting to be signed by the President, --- which publication is of a treasonable nature, designed to give aid and comfort to the enemies of the United States,--- you are therefore hereby commanded forthwith to arrest and imprison in any fort or military prison in your command the editors, proprietors, and publishers of the aforesaid newspapers, and all such persons as, after public notice has been given of the falsehood of said publication, print and publish the same with intent to give aid and comfort to the enemy; and you will hold the persons so arrested in close custody until they can be brought to trial before a military commission for their offense. You will also take possession by military force of the printing establishments of the New

(11) Ibid, 113
(12) Ibid, 108

York World and Journal of Commerce, and hold the same until further orders, and prohibit any further publication therefrom."(13)

The President's action was not always so animated. He was required by Congress to fix the width of the Union Pacific Railroad tracks;(14) he found it advisable to forbid the export of hay.(15) Yet decisions calling for statesmanship were not rare. One designed to enforce the rules of International Law was directed July 25, 1863, to the Secretary of the Navy.

"Sir: Certain matters have come to my notice, which induce me to believe that it will conduce to the public interest for you to add to the general instructions given to our naval commanders in relation to contraband as follows, to wit:

First: You will avoid the reality, and as far as possible the appearance, of using any neutral port to watch neutral vessels, and thus to dart out and seize them on their departure.

Note: Complaint is made that this has been practised at the port of St. Thomas, which practice, if it exists, is disapproved and must cease.

Second: You will not in any case detain the crew of a captured neutral vessel or any other subject of a neutral power on board such vessel, as prisoners of war or otherwise, except the small number necessary as witnesses in the prize court.

Note: The practice here forbidden is also charged to exist, which, if true is disapproved and must cease.

My dear sir, it is not intended to be insinuated that you have been remiss in the performance of the arduous and responsible duties of your Department, which, I take pleasure in affirming, has in your hands been conducted with admirable success. Yet, while your subordinates are almost of necessity brought into angry collisions with the subjects of foreign states, the representatives of these states and yourself do not come into direct contact for the purpose of keeping the peace in spite of such collisions. At this point there is an ultimate and heavy responsibility upon me.

What I propose is in strict accordance with international law, and is therefore unobjectionable; whilst, if it does

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(13) Ibid, 227
(14) Ibid, 160
(15) Ibid, 275

no other good, it will contribute to sustain a considerable portion of the present British ministry in their places, who, if displaced, are sure to be replaced by others more unfavorable to us."(16)

The orders of President Johnson include one which is significant because it illustrates an important use of a very great power of the President - that of construing or interpreting the statutes. The order referred to was dated June 20, 1867; its preamble shows well the way in which this problem confronted Johnson.

> "Whereas several commanders of military districts created by the acts of congress known as reconstruction acts have expressed doubts as to the proper construction thereof and in respect to some of their powers and duties under said acts, and have applied to the Executive for information in relation thereto; and
>
> Whereas the said acts of congress have been referred to the Attorney General for his opinion thereon, and the said acts and the opinion of the Attorney General have been fully considered by the President in conference with the heads of the respective Departments:
>
> The President accepts the following as a practical interpretation of the aforesaid acts of Congress on the points therein presented, and directs the same to be transmitted to the respective military commanders for their information, in order that there may be uniformity in the execution of said acts:(17)

What followed virtually became the law on the subjects of citizenship, disenfranchisement, engaging in rebellion, etc.

A further example, taken from a recent date, will show the manner in which the necessity of interpreting the laws continually confronts the executive. The Commercial and Financial Chronicle, of January 22, 1910, discussed the executive regulations issued in support of the corporation tax provisions of the Tariff Act of 1909. Dealing with the form of return made up for the use of the corpora-

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(16) Ibid, 176
(17) Ibid VI 552

tions, it said:

> "------the wording of the statute is such that, if literally adhered to, it would be incapable of execution as to the great majority of business corporations. The Secretary of the Treasury in getting up the form of return took cognizance of practical business conditions, and sought to frame regulations and instructions that would make the law harmonize with such conditions.
> "But the instructions which the Treasury Department has issued for the guidance of tax collectors are directly contrary to the utterances and the stand taken by Mr. Wickersham, the framer of the law. In drawing up the form for the returns, the Treasury Department follows the phraseology of the statute quite closely, though not entirely, but construes the same in a manner utterly at variance with the contentions of the Attorney General, and reads into the same a meaning that cannot be found there---.

Speaking with this particular case partly in mind, no doubt, President Taft has, since his incumbency, emphasized strongly the importance of this power of construing the law. "This duty of preparing regulations for the enforcement of the statutes involves their construction. Statutory Construction is practically one of the greatest of executive powers." And, he adds, there are many statutes that do not affect private right in such a way that they can be made the subject of litigation, i.e., brought before the courts.(18)

To return to the administrations in the period following the Civil War, it need only be said that they did not produce many noteworthy executive orders. The scope of things handled in them was little developed. Even Mr. Cleveland revoked an authorization to return to all the states the battle flags carried by their respective troops in the war, having decided that it was not a legal, nor justified executive act.(19)

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(18) Taft, The Presidency, 64
(19) Richardson VIII 579

The contents of the orders was often very prosaic. At one time, it was found necessary to restrain the desire of the army officers to have long-winded Sunday morning inspections; (20) at another, it was solemnly prescribed that the army should be fed lard "substitute" instead of lard "compound": (21) again, the use of towels by two persons was forbidden. (22)

A true ordinance was, however, occasionally published. An act of Congress of Sept. 27, 1890 (23) simply said that in any cases in which the Articles of War left discretion to courts martial the punishment inflicted should not exceed limits which the President might prescribe. Acting under this permissionary, though not mandatory authority, President Harrison laid down a table of maximum punishments for several scores of offenses, supplemented by explicit directions for the conduct of the court martial, and the fixing of the sentence. The maximum penalties fixed ranged all the way from a forfeiture of fifty cents for absence from reville or retreat to ten years imprisonment for manslaughter. (24)

Congress has not always been quite so willing to allow the exercise of wide power by executive order. The Instructions to Diplomatic Officers of 1897, and Regulations for the Consular Service of 1896, were amended, January 3, 1908, so as to change the rank of diplomatic officers. (25) This was followed by an act of Congress, March 2, 1909, that thereafter no

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(20) Ibid, 29
(21) Checklist, U.S. Pub. Doc., Jan. 31, 1913
(22) Ibid, Sept. 30, 1913
(23) U.S. Stat. at Large 1889-90, Sess. 1, P.491
(24) Richardson IX, 167.
(25) Supra (21) Jan. 3, 1908

new ambassadorships should be created unless by act of congress.[26] The President immediately after, on April 14 (perhaps not in retaliation)directed the heads of departments to furnish information when called for by Resolution of the House or Senate, unless in their judgment it would be incompatible with the public interest, when they should refer the matter to the President for his direction.[27]

The Great War naturally brought out an interesting expansion of the subjects treated by executive order. An order of May 20, 1918 authorized the redistribution of certain duties and functions heretofore performed by the Chief Signal Officer of the Army, appointing a Director of Military Aeronautics to have charge of work formerly performed by the Aviation Section of the Signal Corps, and establishing a Bureau of Aircraft Production.[28]

Funds, too, were handled just as freely as functions. Appropriations under the Trading with the Enemy Act were allotted by the President to the War Trade Board, Alien Property Custodian, Secretary of the Treasury and Federal Trade Commission.[29] Soon after an order directed that $120,000 be transferred from the appropriation for the censorship of foreign mails under the Post Office Department for the fiscal year 1919, and allotted to the Secretary of War for the conduct of the censorship of mails in the Panama Canal Zone during the said fiscal year.[30] Another order of June 19, 1918 authorized the payment of $6,000,000 to Great Britain as one-third part of the purchase price, transportation charges, etc., of 2,000,000 tons of Swedish iron ore, the purchase of which was pro-

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(26) West, Comp. Stat., 3, 121
(27) Supra (25) April 14, 1909
(28) Ibid, May 20, 1918
(29) Ibid, Feb. 3, 1918
(30) Ibid, Oct. 3, 1918

vided for in the agreement of May 29, 1918, with the governments of Great Britain, France, Italy and Sweden.(31)

The volume of war powers conferred upon the President was so great that he shifted the burden as much as possible by regranting power to various subordinate bodies. A long order of Oct. 12, 1917, vested the various powers granted to him by the Trading with Enemy Act and Espionage Act in the War Trade Board, War Trade Council, Secretary of the Treasury, Censorship Board, Federal Trade Commission, Postmaster General, Secretary of State, Secretary of Commerce, and Alien Property Custodian. Extensive and detailed powers were vested in each.(32) Order of May 31, 1918, vested in the Attorney General all power and authority conferred upon the President by provisions of the act to punish interference with our neutrality, foreign relations, commerce, etc., and in the Secretary of Labor all power given to the President by act of May 16, 1918, which authorized the President to provide for war needs.(33) Later orders delegated to the Shipping Board and the Emergency Fleet Corporation, respectively, the powers granted to the President by acts of congress relating to the emergency shipping fund, approved on or before Nov. 4, 1918, designated further powers of the Alien Property Custodian and Federal Trade Commission, and vested in Frank L. Polk authority conferred on the President by Section twelve of the Trading with Enemy Act.(34)

These war time acts of the executive are, however, probably

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(31) Ibid, June 19, 1918
(32) Ibid, Oct. 20, 1917
(33) Ibid, May 31, 1918
(34) Ibid, Dec. 3, 1918

less significant than is the tendency of the executive share in legislation to grow during ordinary times. Congress seems more and more inclined to leave to the Executive, perhaps properly so, the task of framing difficult provisions of law which in former years it would have felt compelled to perfect itself. For example, the tariff act of 1909 provided that corporation tax returns were to be open to inspection, a provision which aroused great opposition on the ground that rival corporations could obtain valuable knowledge by this method which they had never before been able to get, and to which they had no right. Accordingly, in the Tariff of 1913 (Sec. 2Gd), Congress recognized the difficulty, but instead of deciding what inspection of returns was proper and necessary, passed that task on to the Secretary of the Treasury, binding him only to give the officials of State governments some sort of access to the returns of corporations from their own state.

So, in due time, an Executive Order of July 28, 1914, closed the inspection of returns except in the following cases:

1. All returns to be open to inspection by the proper officials of the Treasury Department.
2. Official of other department required to make written request countersigned by his chief.
3. Secretary of the Treasury might authorize use in suits involving the taxes concerned.
4. He might also permit any stockholder of a corporation to inspect its return upon positive proof of his identity.
5. Returns of any corporation whose stock was listed on a regular stock exchange or advertised for general public sale, might be inspected by anyone upon proof that the corporation had this public nature.
6. Returns of individuals open to no inspection unless by the Department of Justice in a suit.
7. State officials might inspect when the Governor, under the State Seal, (a) certified that his state imposed a general income tax (b) gave the name and address of each corporation whose return it was desired to inspect, (c) explained reasons for the inspection, (d) named authorized

inspectors.[35]

In this manner, both the rights of those making the returns and of those who might benefit from access to them were maintained. Probably the balance was more nearly struck by Executive action than it would have been by Congressional, but in an earlier day Congress would have thought it necessary to say what should be done and what not.

This increasing tendency - or necessity - of leaving complicated subjects of legislation to the Executive could not be more fully shown that in the case of the reorganization of the Customs Service by President Taft. Feeling that the entire Customs Service should be overhauled, and desiring incidentally to effect a small economy, congress enacted, August 24, 1912 that

> "The President is authorized to reorganize the Customs Service and cause estimates to be submitted therefore on account of the fiscal year nineteen hundred and fourteen bringing the total cost of said service for said fiscal year within a sum not exceeding $10,150,00 instead of $10,500,000 the amount authorized to be expended therefore on account of the current fiscal year nineteen hundred and twelve; in making such reorganizations and reductions in expenses he is authorized to abolish or consolidate collection districts, ports, and sub-ports of entry and delivery, to discontinue needless offices and employments, to reduce excessive rates of compensation below amounts fixed by law or executive order, and to do all such other and further things that in his judgment may be necessary to make such organization effective and within the limit of cost herein fixed; such organization shall be communicated to congress at its next regular session and shall constitute for the fiscal year nineteen hundred and fourteen and until otherwise provided by congress the permanent organization of the custom's Service".[36]

On March 3, the last day of his administration, Mr. Taft transmitted a message to congress, which, after reciting the

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(35) Treasury Decisions, 1914, P.86.
(36) West, comp. Stat. Sec. 5327.

authority above quoted, declared that "it is hereby ordered and communicated that the following plan shall be the organization of the customs service for the said fiscal year 1914, and unless otherwise provided by congress the permanent organization of the customs service."(37) In view of the comprehensive nature of the authority granted, and exercised, it seems pertinent to examine this "plan" in some detail.

Article I provided that "In lieu of all customs - collection districts, ports and sub-ports of entry and delivery now or heretofore existing there shall be 49 customs-collection districts, with district headquarters and ports of entry as follows:" Then follows in detail the composition of the 49 districts. This was certainly a thoroughgoing start at reorganization.

Article III contained a clause, "The privileges of the first and seventh sections of the act of June 10, 1880, commonly known as"the immediate transportation act" shall remain as heretofore, existing with respect to the ports of entry above mentioned." The effect of this section is to extend to importers the right to ship goods in bulk from the coast to any of the several hundred "ports of entry mentioned above". The right is no longer confined to the seventy-four ports mentioned in the law quoted - a considerable amendment.

Article IV abolished offices, created others and fixed their salaries in the following manner. "There shall be one collector of customs for each of the customs collection districts above established, who shall receive the compensation hereafter set forth, which

(37) Ibid.

shall constitute all the compensation and emoluments to be received by him and which shall be in lieu of all fees, commissions, salaries, and other emoluments of any name or nature." Included in the article is a list of the districts with the salary the collector of each shall receive. Many offices are continued; many abolished.

Article VII gives the Secretary of the Treasury power to appoint "a deputy collector to have charge of each port of entry, who shall perform such duties and receive such compensation as the Secretary of the Treasury shall determine". That official is here given the power to appoint some hundreds of officers, and to name their salaries, a power over patronage which congress on its own initiative would probably have scarcely even considered giving to him.

Attached to this plan of reorganization was the estimate of expenditures for the fiscal year 1914 called for by congress. (9pp.) Its items came to a grand total of $10,681,766.01, which is an increase over the $10,500,000 authorized for 1912. On the basis of the preceding three years, however, the President estimated that the sum could be reduced $300,000 by reason of vacancies, suspensions, etc. But even this subtraction leaves the total at $10,381,766. certainly more than the $10,150,000 figure below which he was expressly ordered to come as a result of his reorganization. That he kept this order in mind is evident from the beginning of his message. "I was authorized to reorganize the customs service and cause estimates to be submitted therefore on account of the fiscal year 1914, reducing the total cost of said service for said fiscal year by an amount not less than $350,000". No explanation of his failure to

do so, even after allowing for death and resignation, is given. Congress must have made a mistake in this effort at economy.

But to view the plan as a whole, we have here a piece of legislation of the first rank dealing with many different things, with large numbers of offices, and affecting the public quite closely. In legal theory it is the act of congress, yet the Executive was its sole creator; congress merely approved it.

Certainly Congress had always before legislated on the subject in the greatest detail. Title Thirty Four of the Revised Statutes contains a great collection of laws defining the customs collection districts, by describing the waters, shores, islands, etc., comprised in each, creating ports and subports of entry and delivery in various districts, and creating offices with their powers and compensation. According to West's compiled Statutes (1918) nearly all of these sections, and like provisions subsequent to the Revised Statutes, were superseded by the reorganization of 1913.(38) To be exact, sections 2515 to 2607 R.S. were superseded, together with 65 sections of chapter two of the same title - in all 157 sections. Similar acts passed since 1875 must have been numerous, so that it seems fair to say that this single act of the President superseded a couple of hundred provisions in acts of congress - a little less than a hundred separate laws.

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(38) Ibid. P.848.

Chapter VI.

THE CIVIL SERVICE RULES

The rules for the selection and government of the Civil employees of the government have not been issued consistently in any one form (i.e. as Executive orders) but have come out in almost every sort of document to which the President sets his pen. Some forty-three collections of these regulations have been published since 1872.[1] The regulations of that year were first transmitted to congress by President Grant in a special message of December 3, 1871.[2] The last clause of the sundry civil appropriations bill of March 3, 1871 had provided "that the President of the United States be, and he is hereby, authorized to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge and ability for the branch of service into which he seeks to enter; and for this purpose the President is authorized to employ suitable persons to conduct said inquiries, to prescribe their duties, and to establish regulation for the conduct of persons who may receive appointments in the civil service".[3]

The rules were thriteen in number, drawn up by the commission appointed under the act. They comprised a rather meagre reform, but the President felt that he needed "all the strength that congress can give me" to put them into effect. He interpreted

(1) Checklist, U.S. Pub. Doc. 380.
(2) Richardson, Messages and Papers of the President VII, 156.
(3) U.S. Statutes at Large 1869-71 P.514.

the law as giving him full power to enforce these regulations, and abridge or amend them, but he thought they would not be binding upon his successors. He seems never to have thought of looking further than congress for his authority in the matter.

By 1883, however, both law and regulations had increased in scope and in detail. The law of Jan. 16 in that year was a separate enactment, establishing the Civil Service Commission and outlining its duties, the first of which was to aid the President, at his request, in preparing the rules. Eight of the rules were specified in the act,[4] and it was followed on May 7, by President Arthur's regulations.[5] These were promulgated not only under the law but "In the exercise of the power vested in the President by the constitution". This power is presumably that of appointment, which was discussed in this relation by the opinion of Carr v. Gordon (1898). "Possessed by the constitution of the power of appointment and removal, except, possibly, as he may be therein restricted by act of congress, the executive has a right to regulate for himself the manner of appointment and removal".[6]

These rules of 1883 are much more comprehensive than the earlier ones. They include the principles required by Congress and others of equal importance. The relation between law and regulation, may be illustrated in the matter of probation. The law said "that there shall be a period of probation before any absolute appointment or employment". The regulation said, in Rule XVII,

> "1. Every original appointment or employment in said classified service shall be for the probationary period

(4) Ibid, 1882-3, Chapter 37.
(5) Richardson, VIII, 161.
(6) 82 Fed. Rep., 379.

of six months, at the end of which time, if the conduct and capacity of the person appointed have been found satisfactory, the probationer shall be absolutely appointed or employed, but otherwise be deemed out of the service.

"2. Every officer under whom any probationer shall serve during any part of the probation provided for by these rules shall carefully observe the quality and value of the service rendered by such probationer, and shall report -----" in detail, for filing, etc.(7)

Rule XIII, coordinate with the others, is one of those of which the statute makes no mention. It says:

"No question in any examination or proceeding by and under the commission or examiners shall call for the expression or disclosure of any political or religious opinion or affiliation, nor shall any discrimination be made by reason thereof if known; and the commissions and its examiners shall discountenance all disclosure before either of them of such opinions by or concerning any applicants for examination, or by or concerning anyone whose name is on the register awaiting appointment".(8)

But, as always, "the order is not the law of the land; it is not the emanation of the lawmaking power, but merely a regulation adopted by the executive, as he rightfully might, in regulation of the conduct of those who are subject to his authority.(9)

From this time on, the rules were issued chiefly in the form of executive orders. In fact President Hayes had earlier used his orders frequently to state principles of civil service reform. An order of February 4, 1879, to General A.E. Merrit congratulated him on his confirmation and urged him to make all his appointments on a strictly business and non-partisan basis, adding that "neither my recommendations nor that of Secretary Sherman, nor of any member

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(7) Supra (5)
(8) Ibid
(9) 82 Fed. Rep., 379.

of congress or other influential person must be specifically regarded".[10]

Cleveland issued a great many orders amending the rules and condemning undue political activity by office holders. In February 2, 1888, he published a codification of all the rules (26 pp.) classified under, general, departmental and bureau heads.

Succeeding Presidents have developed the rules and placed further classes of employees under them until they now have a close resemblance to a large branch of law. They concern, and to an extent regulate the conduct of some hundreds of thousands of people, and if we are to have an extension of government control of the public services, their importance will become acutely evident to everyone.

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(10) Richardson, VII, 549.

Chapter VII.

THE ORDINANCE POWER IN THE TERRITORIES.

The government of territories, not integral parts of the state, has proved everywhere a field particularly adaptable to, even requiring, the exercise of a practically independent ordinance power by the Executive. The Crown Colonies of England, and the colonies of France legislated for almost entirely by the President, are familiar fields of the ordinance power. Its exercise on an important scale by the President of the United States has been incidental to our recent and sudden acquision of extensive colonies, and therefore less known, though probably just as striking as abroad.

The President has regulated the affairs of colonial and conquered territory in proclamations or in executive orders as the occasion demanded. The earliest proclamation of this kind was given out by Madison in 1810. The territory south of the Mississippi River and extending to the river Perdido, to which the United States had a claim under the Louisiana Purchase, had been occuppied since that treaty (1803) by Spain. Madison therefore decided to take military possession of the area, fearing that our title to it was not growing any stronger while Spain was in possession, and assuring that power most politely that in our hands it would not cease to be "a subject of fair and friendly negotiation and adjustment."(1)

President Polk never felt inclined to deal in such a gentlemanly manner with Mexico. During his war with that country, he ordered (March 1847) that military contributions be levied upon

(1) Richardson, Messages and Papers of the Presidents I, 480.

the ports and other places of the enemy, and that as one means of collecting the sums required the ports of the country be opened and revenue collected upon a scale of duties prepared by the Secretary of the Treasury. That vigilant official later caused the duties to be altered to increase the amount of revenue obtained.(2)

The authority for such action, and all other governmental measures in occupied territory is that of the President as Commander in Chief. All such directions are valid until Congress sees fit to supersede them; wherefore one who has paid taxes to such a government, although under protest, cannot maintain an action to recover them.(3) Such was the holding in two decisions of the Mexican war period, as to custom duties paid to the provisional government of California in Cross v. Harrison,(4) and to the same effect in Fleming v. Page(5) relating to the provisional government of Tampico.

The efforts of Lincoln and Johnson to reestablish state governments in the south, quoted ante, have been often discussed. It may not be so well known that the practice of farming out offices led to an executive order, March 31, 1871, notifying territorial officers that they were expected to stay in the territories they governed - maintain a sort of residence there, at least.(6)

The affairs of the territory of Alaska were occasionally regulated directly by executive order, as in the case of July 3, 1875, forbidding the importation of certain firearms.(7) Infre-

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(2) Ibid, IV 523, 529.
(3) Glenn, The Army and the Law, (1919) 100.
(4) 16 Howard 164.
(5) 9 Howard 603.
(6) Richardson VII 218.
(7) Ibid 328.

quently an order was directed to Hawaii, as, for example to reserve a site for a lighthouse.

Colonial government by executive order did not attract much attention in this country, however, until the acquisition of the Spanish islands thrust great responsibility suddenly on the Executive. From 1898 to 1903 for Cuba, from 1898 to 1900 for Porto Rico, and from 1898 to 1902 for the Philippines, the President governed on his own authority as Commander in Chief of the Army and Navy. During all this interval the President directly or through his agents exercised all the executive power, all the legislative power and created all the judicial power in those territories. He was the supreme ruler and law giver of ten millions of people.(8)

The efficacy of executive action under the circumstances was shown in Porto Rico. It was necessary to regulate intercourse with that island at once, so Customs and Immigration Regulations were issued early in 1899. The latter regulated entrance into the country quite drastically, fixing strict rules regarding quarantine, deportation, etc. Similar necessity urged special relief for the commerce of the island. An executive order placed all food supplies, implements of husbandry, and machinery on the free list going into Porto Rico.(9)

Philippine fiscal affairs were regulated in the same way. In April 15, 1901, the War Department invited suggestions and recommendations on the Philippine Tariffs submitted by the Philippine Commission to be considered with a view to amendment before

(8) Taft, the Presidency, 92
(9) Foraker, Porto Rico, 1.

promulgation. The tariffs were put in force five months later. In 1904, Congress having (1902) authorized the President to establish a civil government for these islands, the same process was repeated in amending the schedules.(10)

The case of the Canal Zone is still more unique.. By an act of April 28, 1904, the President was directed to take possession of the Zone under the terms of the Hay-Varilla treaty just ratified. Section seven of the Law provided that all military civil and judicial power, as well as the power to make rules and regulations, should be exercised under the direction of the President until the expiration of the Fifty-eighth Congress. The Fifty-eighth Congress expired without making provision for the future government of the Zone.

In this exigency, Mr. Taft, as Secretary of War, advised President Roosevelt to continue the existing government, which he did, as did Mr. Taft himself as President. Seven years elapsed before Congress made any further provision for the government of the Zone.(11)

The course of government in this interim is quite instructive. Dissatisfaction with the cumbersome action of the Commission of seven in charge of the Zone under the Act of Congress led, April 1, 1905, to the issuance of an executive order concentrating authority in the hands of an executive committee of three, consisting of the chairman of the Commission, the Governor, and the Chief Engineer. Friction still resulting, two other attempts were made,

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(10) Checklist, U.S. Pub. Doc. 1789-1909.
(11) Taft, 93.

in orders of November 1906 and April 1907, to concentrate authority, but with only partial success because of the necessity of leaving some sort of status to the seven - headed executive imposed by the organic law. Efforts to secure one man control through Congressional action failed, so President Roosevelt decided to concentrate all authority in the Chairman of the Commission, and issued an Executive Order which, "while not in exact accord with the law, secured the end desired. After that date, January 8, 1908, all authority was vested in the Chairman, and though the Commission continued in existence, it exercised no executive authority, but confirmed and ratified such action of the Chairman as might be required, in addition to providing municipal ordinances. This arrangement permitted the subordination of everything, including the Panama Railroad, to the construction of the canal, and resulted in the establishment of an autocratic form of government for the Canal Zone. Laws were changed or new ones made as conditions required by no other formality than an order from the President."(12)

The unusual nature of this government, which grew out of the peculiar conditions in the Zone may be illustrated from the case of a British subject who was sentenced to be hanged for murder without trial by jury, no juries having ever been provided for. At the instance of the British Ambassador at Washington, the Supreme Court of the United States granted a writ of error and reviewed the case, but dismissed it from lack of jurisdiction. Following this incident, the President, notwithstanding the great difficulty of securing impartial juries due to the mixture of races, issued an executive order directing that in all criminal prosecutions in-

(12) Goethals, G.W., The Government of the Canal Zone, 41 ff.

volving the death penalty or imprisonment for life the accused should enjoy the right of trial by jury.[13]

The nature of the government of the Zone during this period is further illustrated in the following executive orders. An order of January 9, 1908, amended the penal code of Laws of the Canal Zone, Article 14, so as to fine or imprison vagrants, mendicants, beggars, or intoxicated persons; another of August 14, amended Section 344 so as to authorize punishment for grand larcency by penitentiary imprisonment not to exceed ten years.[14] Further orders prescribed the mode of procedure in criminal cases,[15] extended and made applicable to the Zone a law of the Republic of Panama of March 11, 1904,[16] and fixed penalties for deported persons who returned to the Canal Zone.[17]

Proclamation of November 13, 1912, established tolls for vessels using the canal.[18] Act of August 24, 1912 directed this step, adding the proviso that the tolls once published could not be changed without six months notice from the President. Proclamation of November 21, 1913, also specifically authorized, laid down, in the greatest detail, rules for the measurement of vessels passing through the Canal.[19]

Executive order of January 26, 1910, authorized the Canal Commission to construct sanitary improvements and to charge a just proportion of the cost to owners of adjacent property; one of July 9, 1914, prescribed rules and regulations for the operation and

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(13) Ibid, 72
(14) Supra (10)
(15) Ibid, Feb. 6, 1908
(16) Ibid, Jan. 8, 1908
(17) Ibid, Sept. 25, 1913
(18) U.S. Stat. at Large, 1912-13, Sess. 3, 93
(19) Ibid, 1913, Sess. 1, 27

navigation of the canal and approaches, including all waters under its jurisdiction; another, August 22, 1914, regulated the operation of street railway cars at crossings; and a fourth provided a method for the determination and adjustment of all claims arising out of personal injuries to employes engaged in actual work on the Canal or Railroad, and establishing a schedule of compensation therefor (March 20, 1914).[20]

These last measures were taken subsequent to the Panama Canal Act of August 24, 1912, which dealt with the permanent form of Government for the Canal Zone. Under its terms, the President was authorized to complete, govern and operate the Canal and govern the Canal Zone through a Governor and such other persons as he might deem competent. All "laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President" were formally ratified and confirmed as valid and binding.[21]

The permanent government, then, is substantially the government worked out during the building of the canal. It rests now, however, on a formal legal basis as General Goethals has made clear "While it still continues as a government by executive order it differs from the one in effect during the construction period in that the President is not permitted to change or in any way modify the orders already in effect, this necessitating action by Congress. The system in effect during construction rested (solely) on the executive order of the President, whereas the new conditions are founded on law." The ordinances of the President have become law formally as well as actually.

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(20) Supra. (14)
(21) Goethals, 93.

Chapter VIII

CONCLUSION

To recapitulate: until modern times the Executive was usually the source of law, as well as the authority back of its enforcement. As the popular share in government increased, both functions passed out of the hands of the titular executive, with exceptions such as the case of the German Emperor who controlled legislation through his appointees in the Bundesrath. Under the parliamentary system the making of much subordinate legislation was still left to the actual executive. Republics influenced by parliamentary practices also lodged a defined ordinance power in the executive.

At the creation of our government, however, antipathy to kings and belief in the wisdom of creating sharply defined departments of government combined to lodge all legislative power in Congress. No reference to any power of the President to issue ordinances was made in the constitution. Congress accordingly legislated in the greatest detail on every subject requiring its attention.

As long as the business of government remained fairly simple this practice caused no difficulty. The executive department issued regulations to govern its officers and guide them in interpreting and enforcing the law, and these at times modified perhaps the intent of the law. Yet it was seldom that the executive laid down any new rule which affected people's conduct. It did so most frequently

while regulating our relations with other nations, i.e., in maintaining neutrality, and in reducing friction on our frontiers both sea and land.

While waging war this normal condition was largely reversed. The President, able to act quickly and effectively, ordered the affairs of citizens at large much as he did those in the armies. Individual rights were curtailed and disregarded, property in any amount was seized for destruction or for temporary use, and any other arbitary step taken which would, in the opinion of the President, aid in the prosecution of the war. Congress in most cases duly ratified these acts. They constituted a temporary rather than permanent accretion of legislative power to the President.

A more solid and lasting expansion of his power has come about incidental to the growth of the country and of its government in the last half century. As the life and industry of the country became increasingly more complex, the subjects and occasions requiring legislation became correspondingly numerous and intricate. At the same time the size of the houses of Congress increased, while the ratio of pure politicians to constructive law makers in their membership decreased. On the other hand, the executive department, though vastly expanded in size, retained its centralized form of organization, and consequent ease of action.

Under these conditions congress increased the practice of requiring the executive to complete laws in constantly increasing degree. In many cases the Representatives felt their incompetence to deal with the subject in hand; in others they merely avoided the

labor. The Executive, too, on its part found ever-recurrent occasions for the determination of questions of interpretation of laws, of means for supplementing them, and of measures to be taken in their absence.

Concurrently, with the last half of this period of expansion in the field for executive action, there has governed a line of able and aggressive Presidents. From Cleveland's assertion, in 1893, of the right of the Federal Government to enforce its processes in Chicago or elsewhere (1) to the present, the Presidents have been ready to assume any new functions devolving upon them. A ready field for the development of their ordinance power was furnished by the acquisition of important colonies.

The possession of this power in the territories may be of only an incidental influence, but the great exercise of legislative power by the President during the Great War seems likely to be of more permanent importance, for the reason that the powers exercised were, in large measure, different in degree only from similar powers the President was already growing accustomed to exercise. There is not a great difference between reorganizing the Customs Service at the request of Congress in normal times and overhauling the Aviation Service ahead of Congressional permission in time of war. In both cases the action of Congress was perfunctory. Certainly the return to a complete dominance of Congress, as after the Civil War, is not to be looked for.

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(1) Rhodes, Historical Essays, 225. "A fresh extension of Executive power without an infraction of the Constitution".

A belief that the war has merely accentuated the change going on within our government is voiced in The New Republic of September 29, 1917.

> "The present struggle has simply brought to a dramatic climax the transference of essential power into executive hands. 'Federalism,' Professor Dicey has written, 'is but the union which precedes unity', and into that significant dictum could be written American Administrative history for the last twenty-five years".

By way of giving reasons for the process, the writer says:

> "A legislative assembly cannot, in the nature of things do well the things that now need to be done. Government requires rapid decision, secret determinations, continuous resolve. It must be in the last resort, have unified action, the action at the most of a small group so single in thought as to act as one will. With a modern deliberative assembly such action is impossible".

And to illustrate the extent of the transformation going on:

> "The individual member of Congress is not alone in his eclipse. The Congressional committees have become less the moulders of legislation than the recipients who may alter its details. Even on the committees themselves the administration now has its avowed spokesman".

This may be regarded as a slightly extreme statement. The editor of the World's Work, however, was, near the same time, similarly impressed.(2) He wrote:

> "The one fact that stands out conspicuously is the enhanced importance of the Presidential office. Mr. Wilson has applied the driving force---and Congress has done practically nothing without the pressure of the White House. The executive departments have prepared practically all the bills which have emobided these new radical laws. Congressmen may introduce particular legislation, but it makes no headway unless the President adopts it for his own. The fact that this preeminence of the White House greatly irritates the legislative bodies has no force in staying its progress. The outbursts that take place, the vaporings of a Reed, a Hoke Smith, A Cummins, merely indicate this surface irritation but serve no other purpose".

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(2) 34: 357, 1917.

These writers, with many others, propose, as an accommodation to the changing structure of government, some sort of admission of the cabinet to the floors of Congress. It is urged that this practice would give the necessary unity of action, and at the same time actually allow Congress, and public opinion, a more potent means of influencing the government. This is, of course, a question involving many arguments and many far-reaching consequences. It does seem to be the proposal which is backed most seriously to bring the executive and legislative departments into proper relations.

Of course any such proposition does violence to the old theory that the duties of the three departments of government must be kept strictly separated. However, the Supreme Court has long been at pains to preserve this theory by calling an act legislative if enacted by Congress or executive if ordered by the President, and, it probably will not oppose the doctrine to any normal development in our government. A recent student of the separation of powers, Dr. Thomas R. Powell, has concluded that

> "The doctrine of the separation of governmental powers as a complete denial of the capacity of one department of government to exercise a kind of power assumed to belong peculiarly to one of the others does not obtain in our public law beyond the confines of the printed page.----- Most acts of the higher executive authorities require both the formulation of a general rule and the determination of its applicability to the specific case - processes usually assumed to be characteristic of legislation and adjudication respectively. And even the lowest administrative act consists not solely in mechanical execution, but partly in the determination of the applicability of some general rule."(3)

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(3) Powell, T.R., Administrative Law, 237-38.

Mr. Herbert Croly, writing on administrative government during the period just preceding the war, testifies as strongly to the inseparability of governmental functions, and also of general legislative and judicial recognition of the superior effectiveness of executive action. He says:

> "The administration has been steadily aggrandized at the expense both of the legislature and the courts. Legislatures have been compelled to delegate to administrative officials functions which two decades ago would have been considered essentially legislative, and which under the prevailing interpretation of the state constitutions could not have been legally delegated. The courts themselves, and particularly the Supreme Court, are continually broadening the scope of the valid exercise of administrative discretion and consequently curtailing their own power of subsequent interference." (4)

The necessity for recognizing the growing predominance of the Presidential Office, and of assuring proper functions to Congress, constitute, to one publicist at least, a situation of the greatest importance.

> "Never in the history of American Government has there been a question so important. Ours is so significantly an age of discovery and reconstruction that few theories and no practice can escape revaluation. Those whose business it is to analyze the workings of our Constitutional machinery have a task fraught with the gravest consequences to the state." (5)

(4) Croly, H., Progressive Democracy, 351 (1914)
(5) New Republic, Sept. 29, 1917.

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